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IN THE

Supreme Court of the United States

October Term, 1968

No. 674

WILLIAM P. T. PRESTON, JR., and PHYLLIS PRESTON LEE,
Petitioners,

against

UNITED STATES TRUST COMPANY OF NEW YORK, WILLARD S. SIMPKINS and ROLAND L. REDMOND, as Trustees under two Deeds of Trust made by WILLIAM P. T. PRESTON, SR., on February 24, 1931 and December 11, 1942, respectively, ELIZABETH PRESTON HUTCHINGS and DORIS PRESTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Second Circuit:

William P. T. Preston, Jr., and Phyllis Preston Lee respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in so far as it affirms an order and judgment of the United States District Court for the Southern District of New York, dismissing the first cause of action alleged in the complaint herein, and denying a motion for a temporary injunction in an ancillary action against the prosecution of an accounting proceeding in the Supreme Court of New York, County of New York.

Opinion Below

The opinion of the District Court is reported at 273 F. Supp. 329 (1967), and that of the Court of Appeals is unreported as yet. Copies of these opinions are appended hereto at pages 11a-20a and 1a-10a, respectively.

Jurisdiction

The order of the Court of Appeals denying petitioners' petition for rehearing (except for a modification of the opinion) was entered on July 24, 1968 (page 31a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Are the rights of a plaintiff under Rule 7(b) (1) of the Rules of Civil Procedure violated when the Court *ex mero motu* dismisses the complaint for failure to state a cause of action upon a motion by defendants to dismiss the complaint on grounds of *res judicata* and improper venue, especially when the Court acts upon a factual theory the plaintiff has been afforded no opportunity to rebut?

In substance, what the Court held was that on a motion for summary judgment dismissing a complaint on the ground of affirmative defenses (specifically, *res judicata*) the plaintiff must be prepared for "an attempt to pierce the allegations of the complaint". The "attempt" was made in this instance not by the respondents, but by the Courts below. Those Courts on different factual theories did "pierce the allegations" of the complaint and dismissed it without affording petitioners an opportunity to controvert the facts which the Courts assumed.

2. Does a District Court have exclusive jurisdiction of a trust accounting action brought weeks prior to a

state court accounting proceeding and involving more inclusive issues?

(Question No. 2 is incidental only to question No. 1 and does not arise unless question No. 1 is resolved favorably to petitioners.)

Rules Involved

Rule 7(b) (1) of the Rules of Civil Procedure provides in relevant part:

> "(b) Motions and other papers.
>
> "(1) An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. . . ."

"Official Form 19, Motion to Dismiss Presenting Defenses of Failure to State a Claim [and others] . . ." provides in relevant part:

> "The defendant moves the court as follows:
>
> "1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted . . ."

Rule 9(g) of the United States District Court for the Southern District of New York, adopted in implementation of Rule 7(b)(1) in respect of motions for summary judgment, provides in relevant part:

> "(g) Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."

Statement of Case

The action was brought under 28 U.S.C. § 1332, the parties being of diverse citizenship and the amount in controversy exceeding ten thousand dollars, exclusive of interest and costs. The jurisdiction of the District Court has never been questioned.

Relief sought. The purpose of the suit was (1; first cause of action) to fasten a constructive trust upon the corpus of an express trust created by William P. T. Preston, Sr., father of the petitioners ("Grantor") on December 11, 1942 (First 1942 Trust) in the amount of assets valued at $464,740.71 at the time of the creation of the trust, since greatly increased in value, on the ground that these assets had been improperly, and in derogation of petitioners' rights, removed from a trust created by Grantor in 1931, or (2; second cause of action) to reform the First 1942 Trust so as to provide for equality of treatment between petitioners and their half-sister, the respondent Mrs. Hutchings, upon the ground that such was the intention of Grantor. Unless relief is afforded under one of these theories, respondent Mrs. Hutchings will inherit from Grantor approximately twice as much as petitioners individually. Some $1,200,000 is at issue. Petitioners' only objective in this suit is equality of inheritance with their sister.

Questions of law presented by the complaint are, in so far as the merits are concerned, those of New York law and are not likely to interest this Court. Hence we raise only the question of procedure—in respect of which we submit that the Courts below disregarded a rule promulgated by this Court, deprived petitioners of due process and so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We shall accordingly state the case primarily so as to show the violation of Rule 7(b)(1), a violation particularly damaging to petitioners in the light of District Court Rule 9(g), but shall preliminarily state the merits in abbreviated form so as to indicate how petitioners were injured by the Court's procedure. The statement of the case respecting procedure begins at page 10, *infra*. The Court may wish to read that statement only, as we seek review only on procedural grounds.

The merits of the first cause of action turned on the validity of a consent given by petitioners' mother, and Grantor's first wife, Fanny Baldwin Morgan, to the removal of the $464,740.71 from the 1931 Trust. Page 11a.

The indenture authorized such removal upon her consent, but further stipulated that her remarriage "shall, for all purposes, be deemed to be equivalent to her death upon the date of said intermarriage." Page 13a.

It is well settled under the New York law of trusts, and, indeed, the law of trusts generally, that the beneficiaries of a trust acquire a vested interest in the corpus, and that property may be removed only in accordance with the terms of the indenture. *Whittemore* v. *Equitable Trust Co.*, 250 N.Y. 298, 301-302 (1929); *Schoelkopf* v. *Marine Trust Co.*, 267 N.Y. 357, 362-365 (1935); *Ludlaw* v. *Ludlaw*, 194 App. Div. (1st Dept. 1920), affirmed, 232 N.Y. 615 (1922); 1 Scott, *Trusts* (1939) § 1271. This proposition has never been questioned in this litigation.

It is equally well-settled that when consent is required by a trust indenture, or by statutory or other provision, an affirmative reasoned act is necessary, which a person who has died or is under some incapacity cannot effectively give. *Delany & Co.* v. *Duvoli*, 278 N.Y. 328, 331 (1938); *People* v. *Sugarman*, 216 App. Div. 263 (1st Dept. 1926); *Croker* v. *Croker*, 117 Misc. 558 (Sup. Ct. N.Y. 1921); *Culver* v. *Title Guaranty & Trust Co.*, 269 App. Div. 627

(1st Dept. 1945), reversed, 296 N.Y. 74 (1946). Similarly, this proposition has never been questioned in this litigation.

In 1934 Fanny remarried Edwin D. Morgan, and accordingly became "dead", and, petitioners submit, unable to give an effective consent.

Subsequent developments in Fanny's second marriage are relevant. At the time of her remarriage Mr. Morgan was a wealthy man, a general partner in the New York Stock Exchange firm of Richard Whitney & Co. Mr. Whitney was then President of the Exchange. In 1937 it developed that Mr. Whitney had embezzled large sums of money and was deeply bankrupt. The firm filed a petition in bankruptcy; Mr. Morgan's fortune was seized by creditors. As events turned out, Mr. Morgan was Mr. Whitney's largest individual victim, and was ruined; he retired to a "dirt" farm in Maryland given him by friends. Fanny was transferred overnight from life in fashionable New York society to poverty in rural Maryland. Cf. *In re Whitney,* 113 F.2d 425 (C.A.2d, 1940).

Petitioners thereafter made their home with Grantor. In 1942 the United States was at war. Petitioner Preston, 18 years of age, was domiciled with Grantor, but because he was a soldier in the United States Army he was stationed at various military camps. Petitioner Lee, a girl of 20 years, was domiciled and living with Grantor.

In the year 1942 the trustees of the 1931 Trust filed an account for reasons presently irrelevant. While the accounting was pending Grantor approached his lawyer, Mr. Roland L. Redmond. For various reasons the tax status of the 1931 Trust was in doubt. As described in Mr. Redmond's memorandum of April, 1961, to petitioners and Mrs. Hutchings, after Grantor's death (page 28a):

> "Being aware of the doubt that existed as to the taxability of the 1931 trust your father asked me to

> prepare some program that might minimize the consequences of this fact. At the same time he told me that he wanted to make provision for his [second] wife Doris by setting up a trust for her benefit having a capital of $500,000. After her death the income of this trust would be paid to Betty [only child by Doris, now respondent Mrs. Hutchings] so that in effect she would be put on an equal basis with the children of his first marriage [petitioners] . . . Mr. Guy Cary [Fanny's lawyer] [Fanny's consent was necessary] . . . advised his client to consent provided a trust was established to give her [Fanny] a limited amount of income. . . ."

In sum: Grantor in 1942 wanted: (1) a program to minimize the taxability of the 1931 Trust and (2) a trust to equalize his children's inheritances. The latter required an invasion of the 1931 Trust. Respecting the invasion Fanny's only price for her consent was a trust fund, a "trust . . . with a limited amount of income".

Mr. Redmond accordingly effected the invasion of the 1931 Trust and with the proceeds established the First 1942 Trust on December 11, 1942, with Mrs. Hutchings and her issue as vested remaindermen and petitioners as contingent remaindermen only.

To minimize the taxability of the 1931 Trust Mr. Redmond took advantage of a statute enacted on October 21, 1942, the Revenue Act of 1942, which afforded tax relief regarding property covered by a general power of appointment "if it [the power] is released before January 1, 1943". § 403 (d) (3), 56 Stat. 944. The Grantor accordingly at the same time released the power of appointment which he had reserved in the 1931 Trust indenture over the corpus of that Trust.

In passing, it might be noted that all over the country powers of appointment were being released prior to January 1, 1943. The advantages were so obvious that the Cen-

tral Hanover Bank & Trust Co. of New York, for instance, sent the following letter to its customers:

> "To Our Customers: October 21, 1942
>
> We have been advised that the Revenue Bill of 1942, now pending before Congress, contains provisions materially changing the Federal Gift and Estate Tax Law relating to powers of appointment. Therefore all persons who have created trusts or are the beneficiaries of trusts should promptly review their trust instruments with their counsel to determine what action, if any, should be taken by them."
>
> Very truly yours,
>
> Central Hanover Bank and Trust Company

Other banks sent similar letters.

Nevertheless, Mr. Redmond, in drawing up Fanny's formal consent, inserted a recital that, in contradiction to his 1961 account of the episode, she had required the release of the power of the appointment as a condition of her consent. Petitioners, if afforded an opportunity, would establish that Mr. Redmond's memorandum of 1961 was correct, and the recital incorrect—inserted perhaps in the hope of the tax advantages granted by I.R.C. [of 1939] § 811(f) when powers of appointment were released for a consideration.

The implicit hypothesis of the Court's opinion, that Grantor released his power of appointment only because of pressure from Fanny, is contradicted not only by Mr. Redmond's memorandum of 1961. Grantor idolized his only son, petitioner Preston. After petitioner Preston had substantially recovered from the crippling and almost fatal wounds which he suffered in the invasion of France in 1944 (he was in the first wave of landing forces on D-Day), Grantor published a book of the letters the petitioner had written home during his military service with the following "Postscript":

"On discharge from the Army, Bill entered Columbia University to complete his studies begun before the War at the University of Chicago.

At Columbia Bill's wound troubled him for a while, but after various treatments it improved considerably. At the present time I am glad to report he has practically no trouble and can lead an entirely normal life.

Bill graduated from Columbia with honors in 1948 and was elected to Phi Beta Kappa with fifty-six others, in a class of over six hundred. He took his M.A. in 1949 and at present is at the University of California in Berkeley. He is taking his Ph.D. in American History and in April 1950 was appointed an Assistant Teaching Instructor beginning in the fall.

This has been an extremely satisfactory career and I am sure that all his family and friends wish him the best of luck and success in the future. I know I do and I am very proud of him.

WILLIAM P. T. PRESTON
Bermuda 1950".

It indeed would be amazing that a man so devoted to his only son would, while his son was engaged in fighting for his country, substantially disinherit him relative to his sister.

(Petitioner Preston is now Professor of American History, and head of the Department of History, at Dennison University, Granville, Ohio. He has four children.)

As could readily be established, Grantor's relations with petitioner Lee were also always affectionate and devoted, although Grantor never had occasion to put that fact in print. Petitioner Lee is married and lives with her husband in Washington, D. C.

The 1943 state court judgment. After the removal of the assets from the 1931 Trust, the documents effecting the

transaction were presented to the Court in the then pending accounting action, but without explanation of the fact that there was a conflict of interest between petitioners and Mrs. Hutchings, all represented by the same guardian ad litem. This guardian filed no exception and his report suggests that he was not aware of the conflict of interest. The state court judgment approved accounts showing the removal, but did not approve the removal as such. R. 175-208, 291-298.

The motion for summary judgment in the present action. Without answering the complaint, respondents moved "pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure" for summary judgment "dismissing the action upon the grounds of *res judicata,* improper venue, and failure to join indispensable parties". Page 21a.

The motion did not, in any manner or by any implication, assert the defense numbered (6) [in Rule 12(b)] to dismiss for failure of the pleading to state a claim upon which relief can be granted" (cf. contrary to implication of opinion of Court of Appeals, footnote 2, page 5a).

Pursuant to District Court Rule 9(g) respondents annexed to their motion papers a "statement of the material facts as to which the moving party contends there is no genuine issue to be tried." Pages 24a-27a.

This statement was confined to facts thought to support the grounds upon which the motion was made, *i.e., res judicata* and improper venue, primarily the state court judgment of 1943. There was nothing in the Rule 9(g) statement which remotely challenged any allegation of the complaint. Fanny's consent, the recitals of which form the basis of the Court's factual theory, was among documents annexed to the notice of motion, but only identified in the statement as an exhibit submitted to the state court. Page 24a.

In their Rule 9(g) statement, respondents asserted that the state court judgment, alleged to be *res judicata*, adjudicated that the 1931 Trust indenture had (page 25a):

> "defined the remarriage of plaintiff's mother as equivalent to her 'death' for purposes of the trust indenture."*

(The Court of Appeals subsequently adopted an opposite construction, *infra* pages 3a-4a.)

In their brief in the District Court, respondents aptly summarized its contents as follows (page 23a):

> "Briefly, the grounds for summary dismissal of these claims are:
>
> 1. *Res judicata* bars relitigation of the property [sic] of the trustees' and Grantor's actions, for they were approved by a judgment of the Supreme Court of the State of New York rendered 24 years ago, in proceedings in which all present parties were represented, which judicially released and forever discharged the trustees in that respect;
>
> 2. The pendency now in the Supreme Court of the State of New York of final accounting proceedings under the 1931 trust (to say nothing of three prior accountings there) renders it the proper forum and makes venue in this Court, for litigation of the same issues, improper; and
>
> 3. Other parties, such as plaintiff's sister and at least seven children, who are indispensable to proper disposition of the action because of their interests in the various trusts involved, have not been joined."

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* The actual language of the indenture is "all purposes." 13a. In the state court counteraction Mr. Redmond, draftsman of the document, asserted in a verified petition that the definition was for "the purposes" of the indenture, making no exceptions. R. 333.

Petitioners' answering papers. Petitioners' answering papers were also devoted to *res judicata,* improper venue and necessary parties, primarily to *res judicata,* showing *inter alia* the conflict of interests represented by the guardian at litem and the failure of the trustees to call the conflict to his attention. R. 175-208, 291-298. Petitioners did not submit evidence in support of the allegations of the complaint, because, in the language of the Court below, there had been "no attempt to pierce [any] allegation".

The decision of the District Court. The District Judge fully recognized both in his opinion and in his judgment that the motion had been made "on the grounds of *res judicata,* improper venue and failure to join indispensable parties" and that he was dismissing the complaint "for failure to state a claim upon which relief can be granted" (19a-20a; 11a-12a; 18a).

The District Judge accurately sums up respondents' factual and legal theories in a paragraph entitled "Defendants' Contentions" beginning on page 15a; his opinion shows that his grounds of decision bore no relation to these contentions. 16a-18a. But of what the District Judge refers to as plaintiff's contentions (16a-18a), only the first paragraph relates to contentions made in answer to the motion; the other "contentions" referred to were those of the complaint itself, which, because irrelevant to the motion, plaintiff had not attempted to argue either factually or legally.

We do not discuss the merits of the District Judge's opinion as such. Largely, the Court of Appeals disregarded his opinion, based as it was on reasoning and matters not urged upon him by either party. To the extent that the District Judge's opinion was adopted by the Court of Appeals, our discussion of the latter Court's opinion applies.

The arguments in the Court of Appeals. In the Court of Appeals, once more respondents' only points were *res*

judicata and improper venue. Petitioners challenged the District Judge's opinion but respondents supported it only to the extent of a brief footnote. In particular petitioners challenged the procedure of the District Judge.

On the oral argument in the Court of Appeals Judge Anderson was highly critical of petitioners' counsel because, in response to the motion, petitioners had not submitted proof supporting the allegations of the complaint. Judge Anderson expressed dissatisfacion with the answer that the motion had been based on affirmative defenses and had not challenged the allegations of the complaint. It was evident that counsel and Judge Anderson were far apart as to what was required of counsel for plaintiff in response to a motion for summary judgment based on affirmative defenses.

The opinion of the Court of Appeals; first cause of action dismissed for failure to state a claim upon which relief could be granted and upon factual and legal theories respondents had not claimed to exist, and which petitioners deny; petitioners rebuked because their answering papers related only to the factual and legal theories upon which motion had been made. The Court of Appeals upheld the judgment dismissing the first cause of action for failure to state a claim upon which relief could be granted without discussion of the procedural issue. Although saying that the Court agreed with the District Judge that, by a construction of the instrument, the effect of remarriage as "death" did not apply to her consent to removals from the Trust, the Court based its analysis on what it assumed to be the facts—facts never claimed to exist in respondents' Rule 9(g) statement, and not found by the District Judge, viz., that Fanny's consent was based upon "bargaining" (page 3a) that she "in 1942 was represented by highly competent counsel when she bargained for the benefits she obtained for herself and the plaintiffs [present petition-

ers]" (page 9a), and that, in substance she negotiated on behalf of petitioners and secured substantial benefits for them. Petitioners would deny all these propositions and submit proof accordingly—proof the validity of which is suggested by Mr. Redmond's memorandum. 28a-29a. Indeed, as already noted (*supra* page 11), respondents had claimed that the 1943 state court judgment had adjudicated that the 1931 Trust indenture "defined the remarriage of plaintiff's mother as equivalent to her 'death' for purposes of the Trust indenture", making no exceptions—the opposite of what the Court of Appeals held. Page 4a.

Thus the Court dismissed the complaint upon grounds and factual and legal theories which respondents had never advanced.

The Court seems to imply that respondents had moved to dismiss the complaint for failure to state a claim upon which relief can be granted at footnote 2, page 5a, and indeed refers to *res judicata,* improper venue and indispensable parties as "additional" grounds (page 5a). Any such implication is without foundation, as the Court itself apparently recognizes on page 7a.*

The Court states its rationale as regards procedure in its discussion of the second cause of action. There the Court squarely rules that it is appropriate "to pierce the allegation" of a complaint upon a motion for relief on grounds of *res judicata,* improper venue and indispensable parties (page 7a; after noting grounds of motion, Court proceeds to discuss sufficiency of complaint).

The Court then implies doubt that petitioners' counsel was truthful when he said that he had not expected the District Judge to grant the motion on a ground that had

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* That *res judicata,* improper venue and necessary parties were the *only* grounds is shown by the notice of motion (21a-22a), respondents' brief (23a), the opinion of the District Court (twice; 11a-12a, and 15a-16a) and the judgment of the District Court (19a-20a). Cf. *supra* pages 10-12.

not been advanced because counsel did not make a motion for reargument. But the District Judge's opinion had shown that he was fully aware that he was doing so; he had correctly stated respondents' contentions and then decided the motion on unrelated factual and legal theories; there was no basis for a motion to reargue. Page 7a.

Further, the opinion of the Court of Appeals as originally announced maintained that petitioners' counsel had been "playing games with procedural rules for purely intellectual enjoyment." Page 9a. Although this expression was struck out on petition for rehearing (page 32a), it serves, we believe, to demonstrate the magnitude of what we submit is the Court's error, viz., that, contrary to Rule 7(b)(1), on a defendant's motion for summary judgment on affirmative defenses, plaintiff's counsel must submit a *prima facie* case of the allegations of the complaint whether or not defendant has challenged those allegations or in any respect argued that the complaint fails to state a claim upon which relief can be granted; otherwise, plaintiff's counsel is "playing games with procedural rules", or at least, suspected of that offense.

Reasons Relied on for Allowance of the Writ

1. With great respect to the Court below, we submit that its action in dismissing the complaint for failure to state a claim upon which relief can be granted on a motion for summary judgment on the grounds of *res judicata* and improper venue makes a farce of this Court's Rule 7(b)(1) and its official form 19. This Court there provided in what we and others have believed were unmistakable terms that motion papers must express the grounds upon which relief was sought, and that other grounds should not be entertained, either *ex mero motu* or otherwise.

The injury to petitioners is compounded in this case by:

(1) Respondents' statement under Rule 9(g) of the District Court. This statement in no way put petitioners on

notice that respondents regarded as facts in this case those factual theories which the Court of Appeals adopted and made the basis of its decision. On the contrary the Rule 9(g) statement maintained as a fact that the state court had adjudicated the same construction of the 1931 Trust indenture for which petitioners have contended but which the Court of Appeals rejected and failed to suggest that in 1942 Fanny had "bargained" on behalf of petitioners. *Supra* pages 11, 14.

(2) Questioning the integrity of counsel for saying that he was surprised when the District Court decided the motion on a ground other than that upon which it had been made.

We further note that respondents have at no time departed from the legal and factual theories upon which the motion was originally made, despite the lead given by the District Court. In both Courts respondents adhered to *res judicata* and improper venue. In consequence, petitioners were at no time confronted with the arguments subsequently adopted by the respective Courts. In the District Court we dealt with *res judicata* and improper venue; in the Court of Appeals, with those subjects and the theories of the District Judge.

Respectfully, we submit that if the Rules of Civil Procedure and the forms promulgated by this Court are to mean anything, this procedure is intolerable and can only lead to such miscarriages of justice as, in our opinion, occurred in this case.

Other courts have been strict in the enforcement of Rule 7(b) (1) albeit largely dealing with the requirement of particularity. 2A Moore, *Federal Practice* (1968) 1542; *United States* v. *64.88 Acres of Land,* 25 F.R.D.88 (W. D. Pa. 1960) (Court refused to entertain four grounds of motion not stated with sufficient particularity); *Roloff* v. *Perdue,* 31 F. Supp. 739 (N.D. Iowa, 1939) (Court holding grounds of motion insufficient, would not act of its own motion on other grounds [reverse of what has been

done here]); *Chicago & Northwestern Ry. Co.* v. *Britten,* 301 F.2d 400, 402 (C.A.8th, 1962) (motion denied because grounds "completely unbuttressed by the particulars required under Rule 7 [b] [1]"); *Wagner* v. *Fawcett Publications,* 307 F.2d 409, 412 (C.A.7th, 1962) ("... court had no right to apply the statute of limitations *sua sponte*"); *Stinebower* v. *Scala,* 331 F.2d 366, 367 (C.A.7th, 1964) (motion denied because grounds given were "vague, indefinite and lack the specificity required by Rule 7[b] [1]"); *Steingut* v. *National City Bank of New York,* 36 F. Supp. 486 (E.D.N.Y. 1940) ("The requirement of this rule ... was not intended as a matter of form but was real and substantial"; motion denied for want of particularity. "There should be strict compliance with the rules, otherwise they will be whittled away and become meaningless and unenforceable".)

In the following cases appellate courts reversed orders dismissing complaints *ex mero motu* where the plaintiffs had not been heard on the sufficiency of the complaint as such. These cases show that other Courts of Appeals have rigidly denied the authority of a District Judge to leap to the conclusion that a complaint is insufficient in the absence of a hearing squarely directed to that issue.

In *Georgia Southern & F. Ry. Co.* v. *Atlantic Coast Line,* 373 F.2d 493 (C.A. 5th, 1967), the Court considered a summary judgment dismissing a complaint entered by the District Court *ex mero motu* upon denying plaintiff's motion for a temporary injunction. The Court reversed, saying that plaintiff was entitled to a hearing on that specific subject and that the District Judge had no right to conclude that at the hearing on the motion for a temporary injunction plaintiff had "effectively presented all of the issues which [it] could or would have presented on a hearing on summary judgment." Page 498. The Court said at pages 497-498:

> "The notice and hearing requirements of Rules 12(b) and 58(c) are far more than formalities.

GS&F was cut off from opportunity to present rebutting evidence and argument relevant to the issue of summary judgment. Stated most baldly GS&F lost its case without a full opportunity to be heard . . .

"The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforseeable thrust with no chance to parry. Notice is ascendant and primary in the Federal Rules. They do not tolerate foils of obfuscation."

In *Gutensohn* v. *Kansas City Southern Ry. Co.*, 140 F. 2d 950 (C.A. 8th, 1944), the Court said at page 953:

"But the district court had no jurisdiction to dismiss the case for failure to state a cause of action as to the trustee without hearing the plaintiffs and the plaintiffs were not heard on the issue: Has a cause of action been stated against the trustee? . . . The district court would not be justified in dismissing ex mero motu the petition for failure to state a cause of action.

In *Harman* v. *Superior Court*, 307 F. 2d 796 (C.A. 9th, 1962), the Court said at page 798:

"The complaint may well not state a claim upon which relief can be granted . . . The Court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot . . . The right to a hearing on the merits of a claim over which the court has jurisdiction is the essence of our judicial system, and the judge's feeling that the claim is probably frivolous does not justify by-passing the right."

2. The decision that the first cause of action was not exclusive as regards a counteraction brought several weeks later in a state court of general jurisdiction is, we submit,

directly contrary to the ruling of this Court in *Princess Lida* v. *Thompson*, 305 U.S. 456, 466 (1939), and cases there cited, that an accounting action seeking "restoration of corpus" of a trust is exclusive of subsequent suits relating to the same subject matter. And in *Green* v. *Green*, 233 F.2d 642 (C.A. 7th, 1956), the Court held that where in a single action all claims respecting two family trusts were consolidated, it was exclusive of other actions raising these claims piecemeal. The cases mentioned by the Court below involved suits in state courts of specialized jurisdiction, and turned on that fact, but respondents' counteraction here was in a state court of general jurisdiction.

(This issue is only incident to the first "reason relied on for the allowance of the writ.")

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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New York, New York
October 18, 1968

Opinion of the United States Court of Appeals

FOR THE SECOND CIRCUIT

[Footnotes by the Court]

Before:

LUMBARD, *Chief Judge,*
ANDERSON, *Circuit Judge,* and
BLUMENFELD, *District Judge.**

Appeal from a judgment of the District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* dismissing the complaint for failure to state a claim for a constructive trust upon assets held by the defendant-trustees and for the reformation of the trust in which they are held.

Affirmed as to the first count and reversed and remanded as to the second count.

BLUMENFELD, *District Judge:*

The plaintiffs in this diversity suit for imposition of a constructive trust upon assets originally part of a trust established in 1931, now held by defendant-trustees under a 1942 trust agreement claimed in a first count, and for reformation of that 1942 trust deed against certain beneficiaries thereof claimed in a second count, appeal from a judgment of the United States District Court for the Southern District of New York, Bonsal, *J.*, dismissing the complaint for failure to state a claim upon which relief can be granted. At the same time, Judge Bonsal also denied the plaintiffs' ancillary petition for an interlocutory

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* Of the District of Connecticut, sitting by designation.

injunction staying state court proceedings by the trustees seeking approval of their final account and an order for final distribution of the 1931 trust assets. We affirm the judgment dismissing the first count and the denial of the ancillary petition, but reverse the dismissal of the second count and remand it for further proceedings.

I.

The plaintiffs asserted separate claims in separate counts to an interest in the assets of the 1942 trust. In the first count the plaintiffs sought to impose a constructive trust upon certain assets once held in a trust established in 1931 by Wm. P. T. Preston, Sr., hereafter the grantor. It was to last until the death of the survivor of the grantor and his then wife, Fanny B. Preston. Consistent with the purpose of that trust to satisfy the grantor's marital obligations to Fanny as worked out in a separation agreement, it provided that a certain amount of the income from the trust was to be paid to Fanny "until the death, as herein defined, . . . of said Fanny B. Preston." A separate paragraph in the trust indenture provided that the above quoted expression "shall for all purpose be deemed to mean the natural death of said Fanny B. Preston or her intermarriage after the date hereof with any person other than the Grantor, whichever of said events shall first occur." Also included in the indenture was a provision for distribution on the termination of the trust of $1,000,000 from the principal to the issue of the grantor and Fanny, and the balance as the grantor might appoint by his Will in default of which it was to be distributed to his issue living at his death *per stirpes*. The trustees were empowered to terminate the trust at any time and return portions of the corpus to the grantor, subject to a proviso that the principal could not be reduced below a value of $2,000,000 without the written consent of Fanny.

They were divorced in May 1931 and Fanny married Edwin D. Morgan in 1934. The grantor also remarried.

In 1942 Fanny Morgan, after bargaining negotiations with the grantor, consented in writing to a return of a portion of the corpus to him in an amount which reduced the principal of the trust to $1,535,259.29. In exchange for Fanny's consent, the grantor, in accordance with the agreement they had reached, immediately paid her $4,000 in cash and created a trust (the second 1942 trust) which provided her with $2,000 annually for life; also, he irrevocably surrendered and renounced his power of appointment over the remaining corpus of the 1931 trust and obtained the surrender by the trustees of their power to terminate the trust. The effect of these surrenders was to guarantee to the plaintiffs an interest in the remainder of the 1931 trust corpus, over their $1,000,000 preference. And, in addition, Wm. P. T. Preston, Sr. created another trust (the first 1942 trust) which provided $2,400 per year each for the plaintiffs [1] and gave to them the entire corpus if the grantor left no issue by his second wife. This last mentioned trust is the subject matter of the plaintiffs' second count and will be considered more fully later.

II.

First we consider the trustees' return of principal to the grantor from the corpus of the 1931 trust.

The question presented is whether Fanny B. Morgan was legally capable of giving written consent to a reduction of the trust corpus to an amount less than $2,000,000. In deciding that she was, Judge Bonsal considered all of the documents relating to these transactions as well as affi-

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[1] In the case of the plaintiff Wm. P. T. Preston, Jr., who was 18 years old at the time, such payments were not to begin until his 21st birthday.

davits which were submitted to him by the parties in connection with the defendants' motion pursuant to 12(b) and 56(b), Fed. R. Civ. P., for a summary judgment of dismissal of the claim. In a reasoned opinion, reported in 273 F. Supp. 329, which recites the pertinent provisions of the 1931 trust *in haec verba,* he held that the definition in the trust indenture stating that Fanny B. Preston's subsequent remarriage would be deemed to be her death related only to the provisions concerning her right to receive income and the use of her life as a measuring life of the trust, in both of which the phrase "death as herein defined" was used and that, contrary to the plaintiffs' contention, she was not so "dead" as to preclude her from consenting to the reduction of the principal of the trust, if she felt it would be in the interest of her children to do so. We agree.

For the purpose of measuring the term of the trust and the time during which she was to receive benefits from it, the termination of her existence in an unmarried status, as well as in being, could appropriately be defined fictitiously by a legal draftsman as "death." The phrase "death as herein defined" was not used in juxtaposition to the provision in a different clause of the trust indenture under which the power of the trustees to terminate the trust as to any part should be "subject always to the proviso that without written consent of said Fanny B. Preston [to] such termination . . ." the principal should not be reduced below $2,000,000. Surely her marital status was not intended to preclude her from consenting to a reduction of the principal upon conditions which she believed would benefit her children. The inability of a dead person to give consent results not from a legal impediment attaching to a particular status; it results from the complete impossibility of performing any act. In 1942, she was alive and obviously she could have given her consent to what was done.

No claim was made of undue influence, coercion or fraud by any of the defendants, and it was conceded that there was none. Thus, there was no need to go beyond a construction of the 1931 trust indenture to determine that the first count ought to be dismissed for failure to state a claim on which relief could be granted.[2]

III.

We do not find it necessary to consider the additional grounds of the defendants' motion for summary judgment, to wit, *res judicata,* improper venue, and failure to join indispensable parties. Therefore, we do not review the District Judge's decision that the judgments of the Supreme Court of the State of New York entered in 1943 and in 1957 approving successive accounts of the trustees under the 1931 trust barred the plaintiffs' claim that the trustees' return to the grantor of some of its assets was in violation of its terms as being *res judicata.*

Nor do we regard his dismissal of the complaint on the ground that it failed to state a cause of action but without prejudice to the plaintiffs' asserting any claims they may have in the final proceeding now pending in the New York Supreme Court, as a holding that there was improper venue in this court. The proceeding presently pending in the state court is for approval of the final account of the

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[2] Although not pleaded, Fanny's actual consent was established on the defendants' motion. Rule 12(b) provides:

> ". . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

trustees under the 1931 trust; the question whether the first 1942 trust should be reformed is not in issue in that proceeding. Plaintiffs' ancillary petition for an interlocutory injunction staying this state court action was properly denied, for a federal court, in order to avoid friction and conflict, should be extremely hesitant in interfering "in fields of law normally and historically local." *Sullivan* v. *Title Guarantee & Trust Co.*, 167 F. 2d 393 (2d Cir. 1948). In all events, this court has jurisdiction and venue is not improperly laid here. See *Beach* v. *Rome Trust Co.*, 269 F. 2d 367, 373-74 (2d Cir. 1959). However, in view of our determination in the next part of this opinion that the second count should not have been dismissed, we hold that the plaintiff's motion to cite in additional parties[3] was improvidently denied.

IV.

As an alternative means for obtaining the same relief sought in their first count, the plaintiffs asserted in the second count that they were entitled to a reformation of the first 1942 trust. In substance, the second cause of action alleges that this 1942 trust, contrary to the grantor's intent, did not place all of his children in a position of equality and parity of inheritance from him. Specifically, the relief sought is the reformation of the first 1942 trust "to provide for the distribution of the Trust principal, upon termination thereof, so that the issue of plaintiff, his sister, Phyllis, and Elizabeth Preston Hutchings [the grantor's issue by his second wife] will benefit equally, *per*

[3] The parties stipulated that Phyllis Preston Lee, sister of the original plaintiff, be added as a party plaintiff. In addition, the plaintiffs sought by motion to add Mrs. Hutchings' children as additional parties defendant and their children as additional parties plaintiff.

stirpes, in their inheritance from William P. T. Preston, Sr."

As we have noted, the notice of motion filed in the District Court by the defendants was for an order pursuant to Rules 12(b) and 56(b), Fed. R. Civ. P., dismissing the action upon the grounds of *res judicata,* improper venue, and failure to join indispensable parties. The plaintiffs contend before us that this specification of the grounds of the motion was insufficient to put them on notice that an attempt would be made to pierce the allegation in the second count with respect to the accuracy of the grantor's intent as expressed in the trust, or that the various documents offered in support of the defendants' motion as noticed were offered for that purpose. Although their counsel protests that he was taken by surprise when the judge ordered a dismissal of the suit for failure to state a claim, he did not seek an opportunity to offer his present argument in the court below by a motion to reargue or otherwise.

The theory underlying the plaintiffs' claim—that a mutual mistake was made in drafting the first 1942 trust[4] —although not specifically stated and not called to the court's attention, does lurk in the allegations and was sufficiently discernible, cf. *Conley* v. *Gibson,* 355 U. S. 41 (1957); *Gins* v. *Mauser Plumbing Supply Co.,* 148 F. 2d

[4] The circumstances broadly disclose that the final draft of the trust indenture was attached as part of the contractual agreement between Fanny and the grantor. There is respectable authority for the view that a court should discriminate in favor of equitable relief for only a unilateral mistake in a case where the grantor has received no consideration; but against such relief, unless there was mutual mistake, in a case where he has received consideration. 4 A. Scott, Trusts § 333.4 at 2634 (3d ed. 1967); Restatement Trusts 2d, § 333 (1959). No doubt all this will come clear on remand should the plaintiffs move to amend their complaint in compliance with Rule 9(c), Fed. R. Civ. P., and should the motion be granted. Cf. *Hadley* v. *Rinke,* 39 F. Supp. 207, 212 (S. D. N. Y. 1941).

974, 976 (2d Cir. 1945), to state a claim upon which relief might be granted. Cf. *Leitner* v. *Goldwater,* 48 N. Y. S. 2d 614 (Sup. Ct. 1944), *aff'd,* 269 App. Div. 657, 53 N. Y. S. 2d 460 (1st Dept. 1945).

In the scheme of rules governing practice in the federal courts a motion to dismiss for failure to state a claim is often several removes from an actual trial. Although a motion for summary judgment entails more than a motion to dismiss for failure to state a cause of action, *Revlon, Inc.* v. *Regal Pharmacy, Inc.,* 29 F. R. D. 169 (E. D. Mich. 1961), it still does not reach the stage of a trial on the merits. As this court said in *Empire Electronics Co.* v. *United States,* 311 F. 2d 175, 179 (2d Cir. 1962), and quoted with approval in *Union Ins. Soc.* v. *William Gluckin & Co.,* 353 F. 2d 946, 951 (2d Cir. 1965):

> "the court, on a motion for summary judgment, cannot *try* issues of fact but can only determine whether there *are* issues of fact to be tried; and, once having determined this affirmatively must leave those issues for determination at a trial. The problem besetting courts lies in defining what is or what is not an 'issue of material fact'. It has been said, and it is quite true, that 'no rigid or magical formula can be offered to determine' its existence. 6 Moore, Federal Practice ¶ 56.15(1), at 2103 (1953)."

It does not clearly appear that Judge Bonsal found that there was no issue of fact as to whether such a mistake had been made. Since in 1942 it was immediately possible for the grantor to have provided that no more than $500,000 of the principal of the trust then created should be distributed to his then only child by his second wife on its termination, and that any excess be distributed equally among the grantor's issue *per stirpes,* the plaintiff should be afforded the opportunity to show that the absence of

such a provision was due to a mistake. See *Union Ins. Soc.* v. *William Gluckin & Co.*, 353 F. 2d at 951-52; *Empire Electronics Co.* v. *United States*, 311 F. 2d at 179-80.

The question is not what intent should be derived from the language used in the first 1942 trust indenture but whether that was the language intended. To determine this it is necessary to look outside the instrument.

After a scrupulous analysis by Judge Bonsal of the affidavits and documents which reveal that Fanny Morgan in 1942 was represented by highly competent counsel when she bargained for the benefits she obtained for herself and the plaintiffs in exchange for her consent, it may have appeared highly unlikely to him that the plaintiffs could in this case adduce any competent evidence twenty-five years after the creation of this 1942 trust [5] to prove that its provisions mistakenly expressed what was in fact intended. While we are not insensible of some of the evidence which may have induced that view, and of the addition to the burden *on federal judges when their courts* are used for playing games with procedural rules for purely intellectual enjoyment, "[n]evertheless, sound judicial administration strongly suggests that a court should not attempt to reconstruct the intent of the parties in a complicated factual situation before they have had an opportunity to present evidence on that issue to the fact-trier." *Union Ins. Soc.* v. *William Gluckin & Co.*, 353 F. 2d at 952.

When and if the second count is subjected to a frontal challenge by another motion for summary judgment, the plaintiffs may be able to produce affidavits or depositions

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[5] Although the defendants' motion did not assert laches, see C. P. L. R. § 213(1), (6), Judge Bonsal undoubtedly had in mind the fact that the plaintiff reached the age of 21 in 1945, and thereafter received $2,400 a year from the trust income. Cf. *Dixon* v. *American Tel. & Tel. Co.*, 159 F. 2d 863 (2d Cir.), *cert. denied*, 332 U.S. 764 (1947).

setting forth evidentiary facts to show that there is a genuine issue for trial.[6]

Having considered that there was no forthright attempt to pierce the allegations of the second count by a motion directed toward a revelation of them as sham, and, having determined that the court below did not clearly find that there was no genuine issue as to the material fact of mistake, we do not believe the plaintiffs should be penalized by having their second count dismissed for not having attempted earlier to come forward with proof of evidentiary data or specific facts to show the existence of a triable issue of fact. Cf. *Dressler* v. *M. V. Sandpiper,* 331 F. 2d 130, 133 (2d Cir. 1964).

Accordingly, we are obliged to reverse the decision of the court below insofar as it dismissed the second count and remand the case for further proceedings on that count in accordance with this opinion.

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[6] It is worth pointing out that the 1961 memorandum of Mr. Redmond of a conference by him with the grantor in 1942 will not suffice, for in its present form it is not "admissible in evidence," nor by Mr. Preston, Jr.'s attaching it to his affidavit have its contents been transmuted into his "personal knowledge." Indeed, the memorandum was appended to the affidavit only for the purpose of showing that it was what first brought to the affiant's attention the fact that the first 1942 trust had been considered during the 1942 proceedings brought in the state court by the trustees for the acceptance of their interim account in their administration of the 1931 trust.

Opinion of the District Court

[Footnotes by the Court]

(R. 273-285)

William P. T. Preston, Sr. (the Grantor) who died in 1961, married Fanny, and they have two surviving children, Phyllis (whom plaintiff's attorney seeks to have added as party plaintiff) and the plaintiff, William, Jr. In 1930 the Grantor and Fanny separated, and in May, 1931 they were divorced. The Grantor later married the defendant Doris and they have one surviving child, the defendant Elizabeth. The remaining defendants, Simpkins, Redmond, and U. S. Trust Company, are Trustees of three deeds of trust made by the Grantor in 1931 and 1942.

In his complaint alleging diversity of citizenship, plaintiff asserts two causes of action:

> 1. that there was a breach of trust by the defendant Trustees in 1942 in that, contrary to the terms of the 1931 Trust, they reduced the principal thereof below two million dollars (to the extent of $464,740.71) when they transferred to the Grantor property of the value of $1,077,339.75; the complaint asks that the $464,740.71 be held by said defendants as constructive trustees for the benefit of plaintiff;
>
> 2. that the First 1942 Trust, as executed, failed to effectuate the intent of the Grantor; and that it should be reformed so as to provide that, upon termination, the Grantor's three children and their descendants will share equally, *per stirpes,* in the inheritance from the Grantor.

No claim is made of undue influence, coercion, or fraud by any of the defendants and it is conceded that there was none.

Defendants have moved pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure for an order dismissing the action and granting summary judgment on

the grounds of *res judicata,* improper venue, and failure to join indispensable parties.

From the complaint, and the affidavits and Exhibits submitted by the parties, the following facts appear:

In 1922, the Grantor's uncle, William B. Thompson, died, leaving his property to his widow, Edith, for life, with remainder to the Grantor. In 1926 the Grantor transferred the remainder to defendants Simpkins and Redmond as Trustees. The Trustees were given the power to terminate the 1926 Trust in whole or in part, in which case the trust property would be returned to the Grantor. The 1926 Trust provided that one-half of the income of the trust be paid to the Grantor and one-half be paid to his wife, Fanny.

In 1930, Grantor and Fanny separated, and, in March, 1931, pursuant to a separation agreement, the 1931 Trust was set up with the same Trustees. The Trustees terminated the 1926 Trust and transferred the property consisting of the Thompson estate remainder to the Grantor, who then transferred it, together with some real property, to the Trustees of the 1931 Trust.

The 1931 Trust

The 1931 Trust provided, to the extent here relevant, that it was to continue "until the death of the Grantor and the death as herein defined of Fanny . . . whichever of said events shall last occur" and, subject to the power of termination given to the Trustees, the principal of the trust at the end of the trust term was to be distributed as follows:

$1,000,000 to the issue of the Grantor and Fanny then living, *per stirpes,* and the balance to such persons as the Grantor shall appoint by will, or, in default of appointment, to his issue then living, *per stirpes.*

During the term of the trust Fanny was to share in the income after the death of Edith (who died in 1941); and upon Fanny's death "as herein defined" Phyllis and William, Jr. were to share therein.

Paragraph Third of the Trust provided that

> "for the purposes of this indenture, the intermarriage of said Fanny . . . with any person other than the Grantor shall, for all purposes, be deemed to be equivalent to her death upon the date of said intermarriage, and the expression 'the death as herein defined of said Fanny . . .' shall for all purposes be deemed to mean the natural death of said Fanny . . . or her intermarriage after the date hereof with any person other than the Grantor, whichever of said events shall first occur."

Paragraph Fourth provided that

> "at any time or from time to time during the life of the Grantor, the said Trustees shall have power in their absolute discretion . . . to terminate the said trust as to the whole or any part of the principal of said Trust Fund, provided said Trustees shall not, without the consent in writing of said Fanny . . ., terminate said trust as to such an amount that the property constituting the principal of such trust after such termination shall not have a value . . . of at least Two million dollars . . ."

Edith, the life beneficiary under the Thompson will, died in August, 1941, and her will was probated on October 22, 1941. Redmond was appointed as one of the Executors of Edith's will. A final accounting of the proceedings of the Executors of the William Thompson will was submitted to the Trustees of the 1931 Trust. Because of the questions as to allocation of dividends between Edith's estate and the 1931 Trust, the Executors of Edith's will and the Trustees of the 1931 Trust agreed, in December, 1941, that the allocation of dividends was proper, unless otherwise determined in an accounting proceeding to be brought by the Trustees of the 1931 Trust in the New York Supreme Court, Nassau County, in which case the court's determination would be final.

THE 1942 TRUSTS

In December, 1942 (before the allocation of dividends had been finally determined), the Grantor and Fanny, and Redmond and Simpkins, as Trustees of the 1931 Trust, agreed that the 1931 Trust should be terminated in part and the property delivered to the Grantor; that the Trustees would surrender any power to terminate the 1931 Trust in whole or in part thereafter; that the United States Trust Company should be added as a Trustee; and that the Grantor would dispose of the returned property in a particular manner. In accordance with the agreement, the Grantor

1. paid Fanny $4,000.00;

2. created a trust (First 1942 Trust), with Redmond, Simpkins, and the United States Trust Company as Trustees, to pay the income to the Grantor's second wife, Doris, for her life, and to others, with the remainder to the issue of the Grantor and Doris then living, *per stirpes,* or if none, to the other issue of the Grantor then living, *per stirpes;* and

3. created a second trust (Second 1942 Trust) with the same Trustees, for the benefit of Fanny and others.

Since the contemplated termination of the 1931 Trust would reduce the principal below two millions dollars, it was thought necessary to obtain the consent of Fanny, pursuant to Paragraph Fourth of the trust agreement. Fanny conditioned her consent on provision being made for her as aforesaid. The Trustees, accounting shows that $1,077,339.75 was taken out of the 1931 Trust, reducing the value of the principal to $1,535,239.29.

THE 1942 ACCOUNTING PROCEEDING

An accounting proceeding was filed in the Supreme Court, Nassau County, for the purposes of settling the intermediate accounts of the Trustees of the 1931 Trust, determining the allocation of dividends between Edith's estate and the 1931 Trust, and approving the partial termination of the 1931 Trust on the terms and conditions stated above.

A guardian *ad litem* was appointed to represent the Grantor's three children (and others). A Referee to hear and determine held hearings, and approved the accounts and proceedings of the Trustees of the 1931 Trust. The guardian *ad litem* filed his report, making no objections.

By a judgment dated April 12, 1943, the Supreme Court, Nassau County, approved the accounts of the Trustees, which showed the partial termination of the 1931 Trust and the transfer to the Grantor of the property as to which the trust was terminated, and the Trustees were discharged from further liability with respect thereto. A subsequent intermediate accounting was filed in 1956 in which plaintiff, who had attained majority, was served and was a party. No objections were filed therein and the court approved the Trustees' accounts by a final order in 1958.

In 1967, the Grantor having died in 1961, a final accounting was filed by the Trustees in the Supreme Court, New York County. This proceeding is in abeyance pending disposition of plaintiff's claims in this court.

DEFENDANTS' CONTENTIONS

The moving defendants contend that the 1943 judgment approving the accounts and proceedings of the Trustees of the 1931 Trust is *res judicata* and bars the raising of the issues in the complaint. In essence, this argument is grounded on the proposition that all of the parties to the present action were represented in the 1942 accounting

proceeding and that Fanny's consent to the reduction of the Trust principal below two million dollars, the partial termination of the 1931 Trust, and the transfer of the property to the Grantor to set up the 1942 Trusts, were all fully considered and approved by the court in its judgment. Further, the defendants point out that no objections were filed and that the guardian *ad litem* approved the accounts as they affected the Grantor's children after fully participating in the hearings before the Referee.

PLAINTIFF'S CONTENTIONS

The plaintiff contends that the 1942 proceedings are not *res judicata* because the guardian *ad litem* in that proceeding did not know of the existence of, and therefore could not raise, the issues now presented. The plaintiff, asserting that the interests of Fanny's children conflicted with those of Doris' children, argues that the guardian *ad litem* represented these conflicting interests without informing the court of the conflict, and was thereby disqualified from acting for both Fanny's and Doris' children.

Plaintiff's contentions must be considered in light of the situation which existed at the time of the 1942 accounting. At that time, the Grantor was alive, and indeed he lived until 1961. He was married to Doris and there was no way of knowing how many more children, if any, they might have. Plaintiff and his sister were contingent remaindermen and their interest depended upon their surviving the Grantor and could have been cut off by a termination of the 1931 Trust. *Schreyer* v. *Schreyer,* 100 App. Div. 456, 91 N.Y.S. 1065, *aff'd* 182 N.Y. 555 (1905). Since "*nemo est haeres viventis,*" plaintiff could not then have sought equal treatment with the Grantor's children by Doris. Absent a showing of undue influence, collusion, or fraud, the Grantor was free to dispose of his property in such manner as he saw fit during his lifetime. As the

judgment states in Paragraph Twentieth, referring to the Thompson remainder, "the interest of said William P. T. Preston in said property has at all times since its creation been fully and freely alienable." The Grantor was under no duty to assure equality among his children and, indeed, could have disinherited all or some of them. Accordingly, the duties of the guardian *ad litem* who represented the Grantor's children in the accounting proceeding were to check the Trustee's accounts to determine whether they had properly accounted for the property in the trust and to determine that the 1942 transactions complied with the trust instrument. As to these duties, there was no conflict between the children of the Grantor, and the judgment approving the Trustees' accounts is binding on this court as *res judicata*. *In Re Wade's Will,* 270 App. Div. 712, 61 N.Y.S. 2d 16 (1946), *aff'd,* 296 N.Y. 244 (1947). It is of interest in this connection that the plaintiff, though of full age, failed to file objections in the 1958 trustees' intermediate accounting while his father was still alive.

Plaintiff contends that, for the purposes of the 1931 Trust, Fanny was "dead" from the time of her remarriage in 1934 and that, consequently, error was committed in obtaining her consent to the partial termination of the trust on conditions in part specified by her. The short answer to this is that if Fanny was "dead" her consent was unnecessary, and the Trustees could terminate the trust in whole or in part and return the property to the Grantor for any disposition he chose to make. The better interpretation—that which appears to have been followed at the time—is that Fanny was "dead" for the purpose of sharing in the income of the 1931 Trust and for the purpose of being a measuring life of the trust, and that she was alive for the purpose of protecting her children to the extent she saw fit in the event the corpus of the trust was reduced below two million dollars. It is noted that the expression "the death as herein defined of said Fanny

B. Preston", which appears in Paragraph Third, was used only in the provision making Fanny an income beneficiary and in the provision measuring the term of the trust, and was not used in Paragraph Fourth relating to the Trustees' power of termination. Here again, absent undue influence, collusion, or fraud, the conditions which Fanny imposed in order to give her consent, which were approved in the accounting proceeding, have become *res judicata.*

Plaintiff further argues that the Grantor's "intent" in 1942 was to achieve equality among his children. But the Grantor's intent in 1942 is best established by what he did, and again in the absence of undue influence, collusion, or fraud, there appears no basis for establishing a different intent in 1967, six years after the Grantor's death.*

Defendants' motion for summary judgment dismissing the complaint is granted on the ground that the complaint fails to state a claim upon which relief can be granted, without prejudice to the plaintiff's asserting any claims he may have in the final accounting proceeding now pending in the New York Supreme Court. Plaintiff's motion for an interlocutory injunction staying the aforesaid proceeding and for the addition of parties in this proceeding is denied.

Settle order on notice.

Dated: New York, N.Y.
September 27, 1967.

/s/ DUDLEY B. BONSAL
U.S.D.J.

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* Grantor's intent was that, upon termination of the 1931 Trust, his issue by Fanny would receive one million dollars, and (subject to the Grantor's power of appointment) would share in any balance with any other issue of Grantor. Plaintiff concedes in his complaint that he and his sister Phyllis will each receive upward of $1,500,000 from the 1931 Trust, making a total of upwards of three million dollars to the issue of Grantor and Fanny.

Judgment of District Court

(R. 301-304)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]
(67 Civ. 1073)
(67 Civ. 2020)

Defendants having moved by notice dated May 12, 1967 for an order pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure dismissing the action upon the grounds of *res judicata*, improper venue, and failure to join indispensable parties and granting summary judgment in favor of the defendants, together with such other and further relief as may be just and proper; and

Plaintiff having moved by notice dated June 9, 1967 to add additional persons, in various capacities, as parties plaintiff; and

Plaintiff having moved by order to show cause dated May 24, 1967 with annexed complaint in the above "ancillary action" 67 Civ. 2020 for an injunction restraining the further prosecution of the pending proceeding in the Supreme Court of the State of New York, County of New York (County Clerk's Index No. 5701/1967); and

Argument of all the foregoing motions having been had before me on June 20, 1967, and due deliberation having been had thereon, and an opinion having been rendered and filed on September 27, 1967, it is

Judgment of District Court

ORDERED that defendants' motion for summary judgment dismissing the complaint be and the same hereby is granted and the complaint dismissed for failure to state a claim upon which relief can be granted, without prejudice to the plaintiff's asserting any claim he may have in the final accounting proceeding now pending in the Supreme Court of the State of New York, County of New York (County Clerk's Index No. 5701/1967); plaintiff's motion for the addition of parties is denied; and plaintiff's motion for an interlocutory injunction is denied, and the "ancillary action" 67 Civ. 2020 is dismissed.

Dated: New York, N.Y.,
October 13, 1967.

/s/ Dudley B. Bonsal,
U.S.D.J.

Defendants' Notice of Motion for Summary Judgment

(R. 27-129)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]
(67 Civ. 1073)

Sirs:

PLEASE TAKE NOTICE that upon the complaint and upon the Final Judgment of the Supreme Court of the State of New York entered on April 12, 1943 (Index No. 3029/1942) annexed as Exhibit 1 hereto, the Agreement dated December 7, 1942 annexed as Exhibit 2 hereto, the Final Order of the Supreme Court of the State of New York dated February 6, 1958 (Clerk's No. 2276/1957) annexed as Exhibit 3 hereto, and the Order to Show Cause in the Supreme Court of the State of New York dated April 7, 1967 (Index No. 5701/1967) annexed as Exhibit 4 hereto and upon the pleadings, proceedings, orders and judgments in the Supreme Court of the State of New York affecting the same parties and subject matter, the undersigned will move at the United States Courthouse, Foley Square, New York, New York on May 23, 1967 at 10:00 A.M. in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rules 12(b) and 56(b) of the Federal Rules of Civil Procedure dismissing the action upon the ground of *res judicata,* improper venue, and failure to join indispensable parties and granting summary judgment in favor of the defendants, together with such other and further relief as may be just and proper.

Defendants' Notice of Motion for Summary Judgment

PLEASE TAKE FURTHER NOTICE that pursuant to General Rule 9(c)(2) of this Court, service of opposing affidavits and answering memoranda must be made at least three days before the return day.

Dated: New York, New York
May 12, 1967

Yours, etc.,

CARTER, LEDYARD & MILBURN
Attorneys for Defendants, United States Trust Company of New York,

Willard S. Simpkins and Roland L. Redmond as Trustees
By /s/ LOUIS L. STANTON, JR.
A Member of The Firm
2 Wall Street
New York, New York 10005
REctor 2-3200

MEDINA & MILLER
Attorneys for Defendants, Elizabeth Preston Hutchings and Doris Preston
By /s/ STANDISH F. MEDINA
A Member of The Firm

To:
BAKER, NELSON, WILLIAMS & MITCHELL
Attorneys for Plaintiffs
20 Exchange Place
New York, New York 10005

Excerpt from Defendants' Brief in Support of Their Motion for Summary Judgment

(R. 134-157)

Briefly, the grounds for summary dismissal of these claims are:

1. *Res judicata* bars relitigation of the property [sic] of the trustees' and Grantor's actions, for they were approved by a judgment of the Supreme Court of the State of New York rendered 24 years ago, in proceedings in which all present parties were represented, which judicially released and forever discharged the trustees in that respect;

2. The pendency now in the Supreme Court of the State of New York of final accounting proceedings under the 1931 trust (to say nothing of three prior accountings there) renders it the proper forum and makes venue in this Court, for litigation of the same issues, improper; and

3. Other parties, such as plaintiff's sister and at least seven children, who are indispensable to proper disposition of the action because of their interests in the various trusts involved, have not been joined.

Defendants' Statement Pursuant to General Rule 9(g) of the District Court in Support of Their Motion for Summary Judgment

(R. 130-133)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]
[67 Civ. 1073]

The moving parties contend upon their motion for summary judgment that there is no genuine issue to be tried with respect to the following facts which mandate dismissal of the complaint:

1. Each of the documents annexed to the notice of motion to dismiss is authentic and an accurate copy of instruments filed in the Supreme Court of the State of New York, and may be given the full force and effect of the originals. Exhibit 1 is a true and accurate copy of the Final Judgment of the Supreme Court of the State of New York, County of Nassau, entered on April 12, 1943 (Index No. 3029/1942); Exhibit 2 is a true and accurate copy of an Agreement dated December 7, 1942 filed as an exhibit in the proceedings referred to in Exhibit 1, and is the Agreement referred to in par. Tenth thereof; Exhibit 3 is a true and accurate copy of the Final Order of the Supreme Court of the State of New York, County of New York, dated February 6, 1958 (Clerk's No. 2276/1957); and Exhibit 4 is a true and accurate copy of an Order to Show Cause and Petition duly entered and filed in the

Defendants' Statement Pursuant to General Rule 9(g) of the District Court in Support of Their Motion for Summary Judgment

office of the clerk of the County of New York on April 7, 1967.

2. In its Final Judgment of April 12, 1943 (Exhibit 1 to the motion papers) the Supreme Court of the State of New York, having jurisdiction over the subject-matter and the parties, including all the parties hereto, found and determined in substance as follows—

(a) that the terms of the 1931 trust among other things provided that its corpus could not be reduced below $2,000,000 without the consent in writing of plaintiff's mother Fanny, and defined the remarriage of plaintiff's mother as equivalent to her "death" for purposes of the trust indenture;

(b) that plaintiff's mother had remarried; that thereafter she, the grantor of the trust and its trustees entered into an agreement whereby in consideration of the creation of the 1942 trusts and of other benefits to her, to plaintiff, plaintiff's sister and others, and the surrender by the grantor [now deceased] and trustees of their power further to terminate the 1931 trust, she consented to the reduction of its corpus below $2,000,000.

(c) that the 1942 trusts were duly created and other actions were taken by the trustees and grantor, pursuant to the provisions of that agreement and in consideration of the consent of plaintiff's mother to the partial termination of the 1931 trust; that the trustees terminated the 1931 trust to the extent provided in the agreement and returned that portion of the corpus to the grantor free of trust; that by reason thereof the balance remaining in the hands of the trustees was less than $2,000,000;

Defendants' Statement Pursuant to General Rule 9(g) of the District Court in Support of Their Motion for Summary Judgment

(d) that in so doing the trustees acted prudently, diligently, and properly; and released and forever discharged them as to all of their acts and proceedings.

3. At the time of those proceedings plaintiff was a minor over the age of fourteen, was served, and was represented by a guardian *ad litem*. No objection was filed to the accounts of the trustees.

4. In 1957 the trustees further judicially accounted for their proceedings under the 1931 trust. Plaintiff was served and a party to those proceedings (Exhibit 3 to the motion papers). He was then of full age. The accounts then filed showing opening and closing principal amounts of under $2,000,000. Plaintiff made no objection to the said accounts. The acts of the trustees were once again approved, ratified and confirmed; and the trustees were discharged from all responsibility and accountability as to all matters embraced in their account.

5. Final accounting proceedings under the 1931 trust, which has terminated, are now pending in the Supreme Court of the State of New York. Plaintiff and all other interested persons are parties thereto.

6. None of the following have been named as defendants or joined in the present action: plaintiff's sister Phyllis, who shares with him a $1,000,000 preference and a remainder interest under the 1931 trust and a contingent remainder interest under the 1931 trust and a contingent remainder interest in the 1942 trusts, who is of full age, subject to service, and whose joinder would not defeat this Court's jurisdiction; the three children of defendant

Defendants' Statement Pursuant to General Rule 9(g) of the District Court in Support of Their Motion for Summary Judgment

Elizabeth Preston Hutchings, interested in the principal of the 1942 trusts; the four children of plaintiff for whose benefit reformation of one of the 1942 trusts is allegedly sought; the income beneficiaries under the first and second 1942 trusts; any representatives of the interests of unborn issue of the grantor.

Dated: New York, New York
May 12, 1967

Yours, etc.

CARTER, LEDYARD & MILBURN
Attorneys for Defendants United States Trust Company of New York, Willard S. Simpkins and Roland L. Redmond as Trustees
2 Wall Street
New York, New York 10005

MEDINA & MILLER
Attorneys for Defendants Elizabeth Preston Hutchings and Doris Preston
61 Broadway
New York, New York

Excerpts from the Memorandum of Roland L. Redmond (Affidavit of William P. T. Preston, Jr., Exhibit A)

(R. 177-181)

February 24, 1961

To: Mr. William P. T. Preston, Jr.
Mrs. Phyllis Preston Lee
Mrs. Elizabeth Preston Hutchings

Re: Preston Family Trusts

I think you may be interested in the origin of your family's various trusts and have therefore dictated this memorandum.

* * *

Being aware of the doubt that existed as to the taxability of the 1931 trust, your father asked me to prepare some program that might minimize the consequences of this fact. At the same time he told me that he wanted to make provision for his wife Doris by setting up a trust for her benefit having a capital of $500,000. After her death the income of this trust would be paid to Betty, so that, in effect, she would be put on an equal basis with the children of the first marriage. It was not possible to carry out these plans without reducing the 1931 trust to less than $2,000,000. This could only be done with the consent of your father's first wife. The matter was therefore discussed with Mr. Guy Cary, and he advised his client to consent provided a trust was established to give her a limited amount of income, she having forfeited her rights under the separation agreement by her remarriage to E. D. Morgan in 1934.

* * *

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of April one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. ROBERT P. ANDERSON,
Circuit Judge,

HON. M. JOSEPH BLUMENFELD,
District Judge.

WILLIAM P. T. PRESTON, JR.,
Plaintiff-Appellant,

v.

UNITED STATES TRUST COMPANY OF NEW YORK, WILLARD S. SIMPKINS and ROLAND L. REDMOND, as Trustees Under Two Deeds of Trust Made by WILLIAM P. T. PRESTON, SR., on February 24, 1931 and December 11, 1942, Respectively, ELIZABETH PRESTON HUTCHINGS and DORIS PRESTON,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to the first count but that said judgment as to the second count be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

WILLIAM P. T. PRESTON, JR.,
Plaintiff-Appellant,

v.

UNITED STATES TRUST COMPANY OF NEW YORK, WILLARD S. SIMPKINS and ROLAND L. REDMOND, as Trustees under a Deed of Trust made by WILLIAM P. T. PRESTON, SR., on February 24, 1931,
Defendants-Appellees,

WILLIAM P. T. PRESTON, JR.,
Plaintiff-Appellant,

v.

UNITED STATES TRUST COMPANY OF NEW YORK, WILLARD S. SIMPKINS and ROLAND L. REDMOND, as Trustees under two Deeds of Trust made by WILLIAM P. T. PRESTON, SR., on February 24, 1931 and December 11, 1942, respectively, ELIZABETH PRESTON HUTCHINGS and DORIS PRESTON,
Defendants-Appellees.

—o—

A petition for rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Order Denying Petition for Rehearing

Ordered that said petition be, and it hereby is, granted insofar as it requests that the words "and of the addition to the burden on federal judges when their courts are used for playing games with procedural rules for purely intellectual enjoyment," lines 21 to 24, slip opinion page 2040, be stricken from the opinion.

It is further ordered that said petition be, and it hereby is, denied in all other respects.

J. Edward Lumbard, Jr.
Robert P. Anderson
U.S.C.JJ.

M. Joseph Blumenfeld
U.S.D.J.

July 24, 1968